

New Hampshire Department of Revenue Administration

Fiscal Note Quick Guide

12-2788.1

HB 1641-FN, *requiring the carry forward of certain net operating loss deductions to relate to the creation of new jobs.*

House Ways & Means Committee

This bill would change RSA 77-A:4, XIII(d) to add language to the Net Operating Loss (NOL) statute that will take effect July 1, 2013 (Ch 224:363, Laws of 2011) and extends the loss carry forward amount from \$1,000,000 to \$10,000,000. The additional language proposed in this bill states that the NOL “may be taken only to the extent the taxpayers meets the requirements of paragraph XIX.” The new paragraph, RSA 77-a:4, XIX, would put three qualifying restrictions on \$9,000,000 of the \$10,000,000 NOL carryforward allowed under RSA 77-A:4, XIII(d).

The proposed change in Section 1 of this bill is confusing and appears wholly inaccurate. The bill proposes to amend the existing statute, RSA 77-A:4, XIII(d) to add the language to the end of the existing sentence that states “, and may be taken only to the extent the taxpayer meets the requirements of paragraph XIX.” The bill suggests that the existing language of RSA 77-A:4, XIII(d) states:

(d) On or after July 1, 2013, the amount of net operating loss generated in a tax year that may be carried forward may not exceed \$10,000,000.

The actual existing language of RSA 77-A:4, XIII(d) states:

(d) On or after July 1, 2005, the amount of net operating loss generated in a tax year that may be carried forward may not exceed \$1,000,000.

In light of the apparent drafting error identified above, the Department of Revenue Administration assumes the intent of the bill is to amend the new language of RSA 77-A:4, XIII(e), which was passed in 2011 and becomes effective in 2013. (Ch 224:363, Laws of 2011, extending the loss carry forward amount from \$1,000,000 to \$10,000,000).

Section 2 of the bill proposes to add a new paragraph under RSA 77-A:4 that would put three qualifying restrictions on \$9,000,000 of the \$10,000,000 NOL carryforward allowed under RSA 77-A:4, XIII(e). These qualifiers may be unconstitutional as they would classify and treat taxpayers differently based upon whether or not they had created new jobs. “Distinctions in tax treatment must rest upon reasonable classifications of property, not upon classifications of taxpayers owning a common class of property.” Opinion of Justices, 132 N.H. 777 (1990) citing Opinion of Justices, 115 N.H. 306 (1975). This bill proposes to classify taxpayers - those having in excess of \$1,000,000 NOL and having created new jobs as opposed those having in excess of

\$1,000,000 NOL and not having created new jobs. A review by a constitutional tax attorney is recommended.

The Department notes that instead of the proposed limitations in new paragraph XIX affecting only the amount over \$1,000,000 generated “on or after July 1, 2013,” the limitations in new paragraph XIX are placed on any amount generated in *any year* and to be taken as a deduction in excess of \$1,000,000. If this bill were to pass this session and become effective within 60 days of passage, there would be no amount over \$1,000,000 generated because the limitation would be \$1,000,000 – until July 1, 2013 when it becomes \$10,000,000 under paragraph XIII (e).

The Department also notes that the proposed language of RSA 77-A:4, XIX is vague and open to interpretation - raising some concerns for the Department:

- Under section XIX (a) - What is a new job? What tax year is this creation of a new job tied to?
- Under section XIX (b) - If each new job created shall only permit a deduction in one tax year, does that mean that if an extra \$10,000 NOL carryforward is created and only \$5,000 of that NOL is needed as a part of the total NOL deduction in the subsequent tax year then the remaining \$5,000 NOL disappears?
- Under section XIX (c) - the bill provides a further qualifier that the new job must have been created because of the possible \$10,000 to be gained as an NOL carryforward amount. The Department could never ensure compliance with the law because the Department would not know the intent of the taxpayer’s job creation strategy.

Administration of this bill by the Department of Revenue Administration would require greater effort on the part of the Department auditors to ensure compliance with the law. Instead of doing an ordinary audit of the NOL deduction, under this new law, the auditors would require additional time to review how the taxpayer arrived at their NOL deduction if it is more than \$1,000,000. The auditor will have to review taxpayer employment records to determine who was hired for a “new job.” In addition, the language of the bill would require the auditor to make a determination as to the taxpayer’s *intent* about hiring such a person and was the credit calculation contemplated when doing so. Moreover, ensuring compliance with this new law would be a challenge for the Department as 39% of audit positions were eliminated through the passage of the FY 2012/2013 budget.

Notwithstanding the apparent drafting error in this bill, the Department could not make a determination as to the possible fiscal impact that this bill would have on a taxpayer (possible negative impact) or on the State (possible positive impact) as a result of the reduction in a taxpayer’s available NOL. The Department has no information regarding new jobs that might be created by taxpayers who may also have NOLs in excess of \$1,000,000.